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No. 84-583

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1984

HOSEA LORENZO WILLIAMS,
Petitioner,
v.
WAYNE MELTON, ET AL.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Attorneys for Petitioner

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QUESTIONS PRESENTED

In the present case Reverend Hosea Williams, a Black Georgia State Representative, was convicted in state court of leaving the scene of an automobile accident. The only direct evidence against him was a hearsay statement by an unknown bystander that the driver of the car was Rev. Williams.

In a case where the prosecution's crucial evidence is uncross-examined hearsay testimony of an unknown bystander:

1. What test should be employed to determine when uncross-examined hearsay statements can be admitted into evidence without violating the Sixth and Fourteenth Amendments?

2. What effect should be given the question of whether Georgia's Res Gestae rule is "firmly rooted."

3. Was the Circuit Court

correct in using a "results oriented" test rather than the four-pronged test established in Dutton v. Evans, supra?

4. Do the facts of this case support admission of the hearsay statement?

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HOSEA LORENZO WILLIAMS,
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The Petitioner, Hosea Lorenzo Williams, respectfully prays that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on June 7, 1984.

OPINION BELOW

The opinion of the Court of Appeals is reported at 733 F.2d. 1492 and is attached to this petition as Appendix A. The order of the Court of Appeals denying the petition for rehearing and rehearing en banc is unreported and is attached to this petition as Appendix B. The District Court opinion is reported at 568 F.Supp. 104 and is attached to

this petition as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1984. The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing *en banc* was filed on August 9, 1984.

This petition is timely filed within sixty (60) days of August 9, 1984. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..."

The Official Code of Georgia, Section 24-3-3 provides that: "Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, shall be admissible in evidence as part

of the res gestae."

STATEMENT OF THE CASE

On July 18, 1980, two automobiles collided at the intersection of McAfee Road and Laurel Lane in DeKalb County, Georgia. Cyrus Broadus, the driver of one of the vehicles involved in the collision was injured in the accident and remained in his car until bystanders were able to remove him. The other car had stopped near a pole at the intersection but the driver of the vehicle was no where to be found.

Within a few minutes of the accident, the police

arrived at the scene. They searched the abandoned car for information indicating who the driver might be and found various items relating to Rev. Hosea Williams.

Several bystanders then told the police that, some ten or fifteen minutes after the accident, an unidentified man had remarked that the driver of the abandoned car looked like Hosea Williams and was wearing a flowered shirt. R.1 at 102, 116, 126. Rev. Williams was arrested shortly thereafter at his place of business, The Bingo Palace.

Rev. Williams was indicted and tried on two counts, a felony, charging him with operating a motor vehicle after revocation of his drivers license and a misdemeanor count, charging him with leaving the scene of an accident without stopping to render aid. During the trial the judge admitted into evidence the hearsay testimony of three bystanders reflecting the statement by the unidentified Black man implicating Hosea Williams in the accident.

Rev. Williams presented a

defense and claimed that the car had been stolen from the Bingo Palace. The general manager of the Bingo Palace testified that she had put a bag of tomatoes and some money in the trunk of the car and might have left the keys in the trunk. She and Rev. Williams' son testified that Rev. Williams left the Bingo Palace between 8:00 and 9:00 P.M., the time during which the accident occurred. When Rev. Williams was arrested he had a cut over his eye. He testified that he had cut it on the jagged edge of a door in a back storage

room of the Bingo Palace. The hearsay statements of the unidentified, unavailable declarant were the sole, direct evidence placing Rev. Williams at the scene of the accident.

The Georgia Court of Appeals reversed Rev. Williams' felony conviction but affirmed the misdemeanor conviction. Williams v. State, 162 Ga.App. 415, 291 S.E.2d. 732 (1982).

Rev. Williams filed a federal habeas corpus petition pursuant to 28 U.S.C., §2254 and the district judge granted relief finding that Georgia's res gestae exception was vague

and imprecise and that the admission of the hearsay testimony violated the federal constitutional requirements imposed by the Sixth Amendment confrontation clause. The district judge concluded that the hearsay statements were express assertions of past fact, there was no evidence whatsoever of the hearsay declarant's personal knowledge of the identity of the driver, there was no opportunity to determine whether the hearsay statement was based on faulty recollection, and, "the totality of the circumstances

under which the statements were made does not give adequate assurance that the declarant was without motive or opportunity to deliberately misrepresent Petitioner's involvement in the accident."

The Eleventh Circuit Court of Appeals issued an opinion in which two judges voted to reverse the district judge and one judge filed a written dissent. The majority concluded that the hearsay declarations fell within Georgia's res gestae exception to the hearsay rule, and that such exception is firmly

rooted. The majority went on to analyze the Sixth Amendment implications of admitting the hearsay without any determination of whether the hearsay could be termed reliable under the four indicia established in Dutton v. Evans, 400 U.S. 74, 89, 91 S.Ct. 210, 220 (1970). Instead, the majority looked at the other circumstantial evidence in the case, employed a "results oriented" test, and concluded that the circumstantial evidence in the case was enough to render the hearsay statements reliable.

In dissent, Judge Clark pointed to the failure of the majority to analyze the case in terms of the reliability of the hearsay under the four-pronged test of Dutton and concluded that the hearsay testimony was clearly inadmissible under this Court's precedent.

Judge Clark pointed to the obvious facts that the hearsay statements in question were "assertions of past fact;" none of the hearsay witnesses heard the statements about the driver of the abandoned car until ten to fifteen minutes after the accident; the statements were

about the identity of the driver rather than an opinion, as was the statement in Dutton; there was no evidence introduced about the declarant's personal knowledge of identity of the driver; none of the hearsay witnesses could testify as to whether the declarant actually witnessed the automobile accident; or if he did what sort of view he had or whether he merely heard that Williams was the driver. The declarant might have overheard the police mentioning the Defendant's name when they found his personal papers in

the abandoned vehicle; cross-examination of the declarant might well have shown that the declarant was not in a position to know whether Williams was driving the car; the complete lack of opportunity for cross-examination made any testing of the declarant's mental state at the time of the statements impossible; nothing about the circumstances under which the statements were made indicate that the declarant did not misrepresent Williams' involvement in the accident; since no one saw the driver of the abandoned vehicle other

than the hearsay declarant, it is not impossible that he was the driver of the car and wanted to shift suspicion to another before he left the scene. Finally, it is possible that the declarant, without meaning to lie, simply passed on information that he heard in the crush of the 30 to 40 observers at the accident scene. Without this evidence the trial would have turned on credibility determinations and the weighing of circumstantial evidence.

REASONS FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT DECISION IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND THE CIRCUIT COURTS ARE IN CONFLICT AS TO THE PROPER STANDARD TO BE APPLIED IN SITUATIONS SUCH AS THIS.

This Court has consistently emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that a primary interest secured by the Sixth Amendment provision is the right of cross-examination. Ohio v. Roberts, 448 U.S. 56, 63, 100 S.Ct. 2531 (1980), Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074 (1965).

The absence of an opportunity to cross-examine a witness and compel him to stand face-to-face with the jury in order that they may look at him and judge by his demeanor and the manner in which he gives his testimony whether he is trustworthy of belief, "calls into question the ultimate integrity of the fact-finding process." Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038 (1973), quoting Berger v. California, 393 U.S. 314, 315, 89 S.Ct. 540 (1969), Ohio v. Roberts, supra at 64.

The Court has recognized

that the purposes of the Sixth Amendment are not always confounded by introduction of hearsay testimony, but the Court has ruled that in order for hearsay evidence to become admissible it must bear adequate "indicia of reliability." Ohio v. Roberts, supra at 66.

In Ohio v. Roberts, the Court stated further that:

> Reliability can be inferred without more in a case where the evidence falls within a firmly-rooted hearsay exeception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness (footnote omitted)"

In Dutton v. Evans, 400 U.S. 74, 88-89, 91 S.Ct. 210 (1970) the Court pointed to four specific indicia of reliability "which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." The four indicia are: (1) whether the statement contained express assertions of past fact; (2) whether the declarant had personal knowledge of the identity and role of the participant in the crime; (3) whether it was possible that

the declarant's statement was founded upon faulty recollection; and (4) whether the circumstances under which the statements were made provided reason to believe the declarant misrepresented the defendant's involvement in the crime.

The circuits are in disarray as to the standard to be used to determine whether hearsay testimony can be admitted without violating the Confrontation Clause. The Ninth Circuit has stated that hearsay may be admitted if it falls within a firmly-rooted

hearsay exception and that such a statement is conclusively unreliable if it does not fall within such an exception. United States v. McKinney, 707 F.2d. 381 (9th Cir. 1983). The Seventh Circuit has stated that the primary purpose of the Confrontation Clause is to secure the right of cross-examination and that court has drawn the line of admissibility by a judgment of whether the testimony is "crucial-devastating." United States v. Blakey, 607 F.2d. 779 (7th Cir. 1979), Flewallen v. Faulkner, 677 F.2d. 610, (7th Cir. 1982),

cert denied, 103 S.Ct. 214.

See also, U.S.v. West, 574 F.2d. 1131 (4th Cir. 1978).

The Eleventh Circuit decision in the present case points out the need for clarification. The District Judge concluded that the res gestae exception contained in Georgia law was not firmly rooted and that none of the four indicia of reliability drawn from Dutton v. Evans, supra, were satisfied by the evidence in this case. The Eleventh Circuit panel majority concluded that the res gestae exception was firmly rooted but

did not rely upon this conclusion to reverse the district judge. The Eleventh Circuit majority went on to look at the other evidence in the case, all circumstantial, finding that this circumstantial evidence provided a sufficient basis for a finding of reliability.

Judge Clark, in dissent, did not discuss whether the res gestae exception was firmly-rooted but pointed out that none of the four Dutton indicia of reliability were satisfied. Further, there were multiple reasons to believe

that the statement was not reliable and it is not unreasonable to conclude that the hearsay declarant might even be the person who stole Rev. Williams' car.

The Eleventh Circuit majority opinion is insufficient because the panel members overlooked the need to find reliability for the hearsay statement itself, focusing instead upon a "results oriented" analysis which more closely resembles the type of analysis one would find in evaluating the sufficiency of the evidence.

Circuit Judge Clark opened his dissent with a succinct statement of the problem:

> I dissent because Georgia's res gestae exception has been applied in an unconstitutional manner. The confrontation issue arises in this case because the jury was being invited through hearsay statements to believe the driver of the abandoned car was Hosea Williams. Because these hearsay statements concerning the identity of the person who committed the crime lack adequate indicia of reliability, they should have been excluded. Circumstantial evidence obtained after Williams was identified as the possible driver, no matter how substantial, cannot provide the reliability required. A study of the purposes achieved by the right of confrontation leads to the conclusion

that any indicia of reliability can only come from a testing of the circumstances which surround the making of the hearsay statements and from the statements themselves."

Clearly, under the facts of this case, the hearsay statement should not have been allowed into evidence.

First, the hearsay statement was the only direct evidence that Hosea Williams was the driver of the automobile. This is particularly important in Georgia because of the statute which limits convictions based upon circumstantial evidence:

"To warrant a conviction

> on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused." O.C.G.A.,§24-4-6.

Without the hearsay the jury would have had to decide the case within this standard. The hearsay evidence must be considered crucial to the state's case and potentially devastating to the defendant's alibi defense.

Second, the statement fails all four of the reliability tests announced in Dutton v. Evans, supra. The hearsay statements in question

were assertions of past fact. As stated by Judge Clark, in his dissent:

> The statements cannot be considered as being contemporaneous with the accident since the record makes it clear that none of the hearsay witnesses heard the statements about the driver of the abandoned car until ten to fifteen minutes after the accident.

There was no evidence introduced about the declarant's personal knowledge of the identity of the driver. None of the hearsay witnesses could testify as to whether the declarant actually witnessed the automobile accident, or if he did, what

had or whether he merely heard that Williams was the driver.

The district court pointed out that testimony elicited upon cross-examination from one of the police officers at the scene indicated that the declarant might have overheard the police mentioning the Defendant's name when they found his personal papers in the abandoned automobile.

The complete lack of opportunity for cross-examination made any testing of the declarant's mental state at the time of the statements impossible.

There is nothing about the circumstances under which the statements were made to indicate the declarant did not misrepresent Williams' involvement in the accident. Specifically, no one saw the driver of the abandoned vehicle other than the hearsay declarant. It is entirely possible, therefore, that the declarant himself was the driver of the car and wanted to shift suspicion to another before he left the scene.

Petitioner respectfully suggests that Judge Clark's analysis, in dissent, is the

proper analysis where there has been no opportunity for cross-examination and the hearsay testimony is crucial to the state's case. This Court should accept certiorari to insure the circuit courts are properly directed in their analysis of similar situations and to vindicate the constitutional rights of Rev. Williams in the present case.

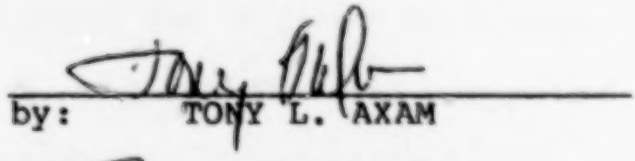
CONCLUSION

For the foregoing reasons, the Petitioner, HOSEA LORENZO WILLIAMS, respectfully prays that the Court accept certiorari and determine the

case on the merits.

Respectfully submitted,

AXAM ALTMAN & McINTYRE, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the foregoing Petition for Writ of Certiorari upon counsel for the opposing parties by depositing same a United States mailbox, with first-class postage prepaid, addressed to counsel of record at his post office address, as follows:

Mr. Robert Wilson
DeKalb County District
Attorney
707 DeKalb County Courthouse
556 N. McDonough Street
Decatur, Georgia 30030

This 7 day of October, 1984.

Robert Altman

ROBERT ALTMAN

FOOTNOTE

[1]The parties are Wayne Melton, chief jailer for DeKalb County and Pat Jarvis, Sheriff of DeKalb County. Both parties are represnted by the District Attorney for DeKalb County.

APPENDIX A

Eleventh Circuit Opinion

Hozea Lorenzo WILLIAMS,

Petitioner-Appellee,

v.

Wayne MELTON, et al.,

Respondents-Apellants.

No. 83-8464.

United States Court of Appeals,

Eleventh Circuit.

June 7, 1984.

Appeal from the United States District Court for the

Northern District of Georgia.

Before RONEY, FAY and CLARK, Circuit Judges.

FAY, Circuit Judge:

Hosea Williams was convicted in state court of leaving the scene of an accident without rendering aid and was sentenced to one year incarceration. During the trial, the judge admitted into evidence certain hearsay statements under the Georgia res gestae exception to the hearsay rule. After exhausting his state remedies Mr. Williams

filed a petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 (1980).[1] The United States District Court for the Northern District of Georgia, 568 F.Supp. 104, granted his habeas corpus petition finding that the admission of the hearsay statements deprived Mr. Williams of his sixth amendment right to confront witnesses against him. After a careful review of the record we find innumerable indicia of reliability in this case which gave the jury an independent basis for evaluating the truth

of the hearsay statements even though there was no confrontation of the unavailable declarant. There was no violation of Mr. Williams' sixth amendment right and we therefore reverse the district court's granting of the petition.

FACTS

On July 18, 1980, two automobiles collided at the intersection of McAfee Road and Laurel Lane in DeKalb County, Georgia. Cyrus Broadus, the driver of one of the vehicles involved in the collision, was hit nearly head-on when the driver of another car attempted to turn left in front of him. Mr. Broadus was injured in the accident and remained in his car until bystanders were able to remove him. His car then rolled several feet down a hill and into a ditch. The other car had stopped near a pole at

the intersection but the driver of the vehicle was nowhere to be found.

Within a few minutes of the accident, the police arrived at the scene. They searched the abandoned car for information indicating who the driver might be and found various documents addressed to and from a Mr. Hosea Williams. They also found a Hertz rental agreement in the name of Mrs. Hosea Williams. Several bystanders then told the police that, shortly after the collision, they had overheard an unidentified man

remark that the driver of the abandoned car looked like Hosea Williams and was wearing a flowered shirt. R.Vol. I. at 102, 116, 126.

Based on this information Hosea Williams was arrested within thirty minutes at his place of business, the Bingo Palace. He was wearing a flowered shirt and had a cut over his right eye. R.Vol. I. at 200, 240-242. At the station the police found a briefcase in the car trunk with $1,400.00 in receipts from the Bingo Palace. Mr. Williams claimed the briefcase with the

money. R.Vol. I. at 293-295, 298. The police also found a plastic bag of tomatoes in the front seat of the car. R.Vol. I. at 292.

Mr. Williams was indicted and tried on two counts, a felony count charging him with operating a motor vehicle after revocation of his driver's license and a misdemeanor count, which charged him with leaving the scene of an accident without stopping to render aid. During the trial the judge admitted into evidence, under Georgia's res gestae rule, the hearsay

testimony of three bystanders. All of them testified that they clearly remembered an unknown declarant at the scene of the accident stating that the driver of the abandoned vehicle looked like Hosea Williams. The jury had to decide whether Williams was the driver of the rented, abandoned automobile involved in the collision. They concluded that he was the driver and returned a verdict of guilty on both counts.

The Georgia Court of Appeals reversed Mr. Williams' felony conviction but affirmed

his misdemeanor conviction. Williams v. State, 162 Ga.App. 415, 291 S.E.2d. 732 (1982). He filed a federal habeas petition and the federal district judge granted relief finding that Georgia's res gestae exception was vague and imprecise and that in this case it also violated the federal constitutional requirements imposed by the sixth amendment confrontation clause.[2] The state appeals the granting of the habeas corpus petition asserting that the admission of the hearsay testimony in this case, under Georgia's res

gestae rule, did not violate the sixth amendment confrontation clause.

GEORGIA'S RES GESTAE EXCEPTION

[1] The term res gestae is almost incapable of a definition that covers all of the various and different uses it encompasses. Walker v. State, 137 Ga. 398, 73 S.E. 368 (1912). It literally means things happened and generally is used to refer to the transaction, occurrence, controversy or matter under investigation, whether it is the principal fact in question

or a collateral one. See, Kornicki v. Calmar Steamship Corp., 460 F.2d 1134 (3d Cir.1972); Black's Law Dictionary, 1173 (5th ed. 1979). Even though hearsay, any circumstances, facts or declarations which are automatic and undesigned incidents of the particular litigated act are admissible evidence as part of the res gestae if they help to clarify the fact in question. Id.

[2] Georgia codified a res gestae exception in 1863 and since then it has consistently been used in the

Georgia courts.[3] See e.g., Standard Oil v. Reagan, 15 Ga.App. 571, 84 S.E.69 (1915); Jones v. State, 62 Ga.App. 734, 9 S.E.2d 707 (1940); Shapiro Packing Co. v. Landrum, 109 Ga.App. 519, 136 S.E.2d 446 (1964); Gaines v. State, 232 Ga. 727, 208 S.E.2d 798 (1974); Black v. State, 154 Ga. App. 441, 268 S.E.2d 724 (1980). The version presently in effect permits "[d]eclarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought," to be

"admissible in evidence as part of the res gestae." O.C.G.A. §24-3-3 (Michie 1982). The trial court, in its sound discretion, must decide on a case by case basis whether or not to admit the hearsay evidence. Based on the time, circumstances and statements in question the judge must determine whether the declarations meet the requirements of being free from all suspicion of device or afterthought. Aetna Life Ins. Co. v. Jones, 80 Ga.App. 472, 479, 56 S.E.2d 305, 309 (1949).

[3] Georgia case law has

established a set of standards which must be met before the hearsay evidence is admitted on the basis of the res gestae exception. As a prerequisite to admission the declaration must appear to spring out of the transaction. Mitchum v. State, 11 Ga. 615 (1852). It must be voluntary and spontaneous, and so close in time to the event that it precludes the possibility of device or afterthought. Clark v. State, 142 Ga.App. 851, 237 S.E.2d 459 (1977). Georgia's res gestae exception distrusts "not after-speech but

afterthought." Travelers' Insurance Co. v. Sheppard, 85 Ga. 751, 775, 12 S.E. 18, 26 (1890).

[4] Applying these standards to this case we find that the trial judge properly concluded that the statements of the unavailable declarant fell within Georgia's firmly rooted res gestae exception. The testimony at trial established a scenario of excitement and confusion. A car had turned into another car, almost head-on. The injured driver of the struck car had to be removed from his

car by bystanders. His car then rolled several hundred yards and crashed into a ditch. In all this confusion, three different people overheard an unidentified declarant state, approximately ten to fifteen minutes after the accident, that the driver of the abandoned car looked like Hosea Williams and that he was wearing a flowered shirt. R.Vol. I. at 98, 102. This declaration was a natural result of the incident and clarified it. It was voluntary and spontaneous and was made at a time so near to it that it

reasonably precluded the idea of any deliberate design. The trial judge properly concluded that the declarations of the unidentified black male clearly fell within Georgia's res gestae exception to the hearsay rule. Yet our review cannot end here. Although the hearsay statements were properly admitted into evidence it is necessary also to determine whether this resulted in a violation of Mr. Williams' constitutional right to confront his adverse witnesses.

SIXTH AMENDMENT

CONFRONTATION CLAUSE

Appellant asserts, based on Ohio v. Roberts, 448 U.S. 56, 62-66, 100 S.Ct. 2531, 2537-39, 65 L.Ed.2d 597 (1980), that statements properly admitted as part of the firmly rooted res gestae exception do not violate per se a defendant's sixth amendment right to confrontation. We do not agree and do not read Ohio v. Roberts to establish such a rule. In Ohio v. Roberts, the Supreme Court found that testimony taken at a preliminary hearing, where the

witness was thoroughly cross-examined, bore sufficient indicia of reliability to make the statements from the hearing admissible at trial, although the declarant was not available.[4] The Court stated that "[r]eliability can be inferred...in a case where the evidence falls within a firmly rooted hearsay exception." Id. at 66, 100 S.Ct. at 2539. Yet this language in Roberts is only dicta because the Court did not find a firmly rooted hearsay exception. It seems to us it would be possible for a court to apply Georgia's firmly

rooted res gestae exception in an unconstitutional manner. We should therefore examine the indicia of reliability present in this case so as to guarantee that petitioner's sixth amendment right to confrontation was not violated.

The sixth amendment right of an accused to confront the witnesses against him or her is a fundamental right. Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). It is so basic that the Supreme Court has held that its denial, "without waiver...would be constitutional error if the

first magnitude and no amount of showing of want of prejudice would cure it." Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956 (1968). The purpose of this right is not only to allow the defendant a chance at cross-examination, but also to allow the jury to observe and judge the credibility of the witnesses. Dutton v. Evans, 400 U.S. at 89, 91 S.Ct. at 219.

[5,6] The declarations of the unidentified male in this case are hearsay. Yet a finding that the statements are

hearsay does not necessarily require a finding that the confrontation clause has been violated. See e.g., Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). The sixth amendment confrontation clause restricts the use of otherwise admissible hearsay in two ways. First, the prosecution must show that the out-of-court declarant is unavailable for trial. Second, where the declarant is shown to be unavailable, a hearsay statement may be used only if the circumstances provide sufficient indicia of

reliability from which the jury can evaluate the truth. Ohio v. Roberts, 448 U.S. 56, 62-66, 100 S.Ct. 2531, 2537-39, 65 L.Ed.2d 597 (1980). In this case all parties have agreed that the hearsay declarant was unavailable. R.Vol. II. at 835. We must therefore only determine whether the circumstances surrounding the hearsay declarations contain sufficient indicia of reliability so as to satisfy the requirements of the confrontation clause.

[7] There is substantial circumstantial evidence in this

case which provided the indicia of reliability needed by the jury to conclude that Hosea Williams was the driver of the abandoned car. Law enforcement officers who arrived on the scene shortly after the accident searched the car and found various documents addressed to and from Mr. Williams as well as a Hertz rental agreement for the vehicle in Mrs. Williams' name. R.Vol. I. at 173-174. Approximately thirty minutes after the accident Mr. Williams was arrested near the Bingo Palace, a business

establishment operated by him and located within a mile of the scene of the accident. R.Vol. I. at 237-243; 249. He was wearing a flowered shirt, was somewhat disheveled and had a cut over his right eye. Id. An accident specialist with the county police department testified that the rearview mirror in the abandoned car had been broken off the windshield and cracked on the left side. Mr. Williams' wound and the broken mirror were consistent with the probable pattern of impact on the driver of the abandoned

car. R.Vol. I. at 284-290. At the police station, a briefcase containing some $1,400.00 in receipts from the Bingo Palace was removed from the car trunk and claimed by Mr. Williams. R.Vol. I. at 293-297. A plastic bag of tomatoes was also found in the car. Id. A customer at the Bingo Palace, on the night of the accident, testified that she gave Mr. Williams a plastic bag of tomatoes that night and later saw him take the tomatoes and his briefcase and head for the front door of the Bingo Palace just before 8:00 p.m. R.Vol.

I. at 154.

The evidence in this case overwhelmingly afforded the jury an opportunity to evaluate the truth of the unavailable declarant's statement. California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). The purpose of the confrontation clause is to increase the accuracy of the fact-finding process by guaranteeing that the defendant has an effective means of testing adverse evidence. Thus, hearsay marked with such trustworthiness that "there is no material departure from the

reason of the general rule," Snyder v. Masschusetts, 291 U.S. 97, 107, 54 S.CT. 330, 33, 78 L.Ed. 674 (1934), does not violate the confrontation clause. There was ample circumstantial evidence in this case to establish the trustworthiness of the hearsay res gestae declarations.

REVERSED.

CLARK, Circuit Judge, dissenting:

I dissent because Georgia's res gestae exception has been applied in an unconstitutional manner. The

confrontation issue arises in this case because the jury was being invited, through hearsay statements, to believe that the driver of the abandoned car was Hosea Williams. Because these hearsay statements concerning the identity of the person who committed the crime lack adequate indicia of reliability, they should have been excluded. Circumstantial evidence obtained after Williams was identified as the possible driver, no matter how substantial, cannot provide the reliability required. A study of the purposes achieved by the

right of confrontation leads to the conclusion that any indicia of reliability can only come from a testing of the circumstances which surround the making of the hearsay statements and from the statements themselves.

The Confrontation Clause reflects a preference for literal confrontation at trial. Ohio v. Roberts, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980); California v. Green, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934-35, 26 L.Ed.2d 489 (1970). The opportunity for personal

examination and cross-examination of witnesses was designed to prevent convictions obtained solely upon the basis of depositions and ex parte affidavits. Mattox v. United States, 156 U.S. 237, 242-43, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895). The chance to confront a witness allowed not only for "testing the recollection and sifting the conscience of the witness" but also for "compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which

he gives his testimony whether he is worthy of belief." Id. Confrontation, therefore, gives the accused and the jury the opportunity to gauge the truth and reliability of the witness' testimony; the accused by testing his recollection of events and the jury by assessing his demeanor. Through its examinations of when hearsay may be admitted without running afoul of the Confrontation Clause, the Supreme Court has maintained this view as to the goal achieved by confrontation. As the Court noted in California

v. Green, supra, confrontation insures that the witness will testify under oath, forces the witness to submit to cross-examination and makes it possible for the jury to observe the witness and thereby better able to assess credibility. 399 U.S. at 158, 90 S.Ct. at 1935, 26 L.Ed.2d at 497. The chances for discovery of truth are enhanced by testimony under oath, subject to cross-examination and given before a jury. If a witness testifies under oath, he is impressed with the seriousness of the matter at hand and made

aware of the possible penalties for lying. Id. The capabilities of cross-examination and observation by the jury for eliciting truth are self-evident.[1] It is because these means of testing accuracy are so important that the lack of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'" Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973), quoting Berger v. California, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d

508 (1969). Nevertheless, the state possesses competing interests, in effective law enforcement and the development of rules of evidence applicable to criminal proceedings, which may warrant dispensing with confrontation at trial. Ohio v. Roberts, supra, 448 U.S. at 64, 100 S.Ct. at 2538, 65 L.Ed.2d at 607. The Supreme Court has attempted to accommodate these competing interests regarding the admissibility of hearsay statements by requiring the state to show both necessity and reliability.

In Dutton v. Evans, the Court established four indicia of reliability "widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970). In assessing the reliability of a hearsay statement, the Court considered: 1) whether the statement contained express assertions of past fact; 2) whether the declarant had personal knowledge of the identify and role of the

participant in the crime; 3) whether it was possible that the declarant's statement was founded upon faulty recollection; and 4) whether the circumstances under which the statements were made provided reason to believe the declarant misrepresented the defendant's involvement in the crime. 400 U.S. at 88-89, 91 S.Ct. at 219, 27 L.Ed.2d at 226. These indicia of reliability serve as substitutes for the usual means of testing accuracy in a way that assessing the strength of the corroborating evidence

against the accused cannot. Asking the Dutton questions allows for a consideration of the circumstances in which the statements were made and through that a testing of the knowledge and perception (2nd question), memory (3rd question) and motivation (4th question) of the witness. In addition, the content of the statement itself can be examined to see if it carries a warning to the jury about the weight it should carry (1st question).[2] Dutton, supra, 400 U.S. at 88, 91 S.Ct. at 219, 27 L.Ed.2d at 226.

If these questions are asked about the hearsay statements admitted against Williams, it appears that they lacked sufficient reliability to meet the constitutional standard. First, the hearsay statements in question were assertions of past fact. The statements cannot be considered as being contemporaneous with the accident, since the record makes it clear that none of the hearsay witnesses heard the statements about the driver of the abandoned car until ten to fifteen minutes after the accident. This single

indication of unreliability is sufficient to reject the hearsay. The statements introduced in this case were statements about the identity of the driver rather than an opinion as was the statement in Dutton.[3] These statements therefore failed to carry on their face a warning to the jury not to give them undue weight. 400 U.S. at 88, 91 S.Ct. at 219, 27 L.Ed.2d at 226.

Second, there was no evidence introduced about the declarant's personal knowledge of identity of the driver. The

declarant did not say anything that would indicate how he knew the driver of the other car was Williams. None of the hearsay witnesses could testify as to whether the declarant actually witnessed the automobile accident, or if he did what sort of view he had or whether he merely heard that Williams was the driver. As the district court pointed out, testimony elicited upon cross-examination of one of the police officers at the scene indicated that the declarant might have overheard the police mentioning the defendant's name

when they found his personal papers in the abandoned vehicle. Under these circumstances, cross-examination of the declarant might well have shown that the declarant was not in a position to know whether Williams was driving the car. Dutton, 400 U.S. at 88-89, 91 S.Ct. at 219, 27 L.Ed.2d at 226.

While it seems unlikely that the statements were based on faulty recollection since they were made so shortly after the accident, the district court was correct in nothing that the complete lack of

opportunity for cross-examination made any testing of the declarant's mental state at the time of the statements impossible. Finally, there is nothing about the circumstances under which the statements were made to indicate that the declarant did not misrepresent Williams' involvement in the accident. Since no one saw the driver of the abandoned vehicle other than the hearsay declarant, it is not impossible that he was the driver of the car and wanted to shift suspicion to another before he left the scene. It is also

possible that the declarant, without meaning to lie, simply passed on information that he heard in the crush of the thirty to forty observers at the accident scene. [T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." Dutton, 400 U.S. at 89, 91 S.Ct. at 220, 27 L.Ed.2d at 227, quoting

California v. Green, supra, 399 U.S. at 161, 90 S.Ct. at 1936, 26 L.Ed.2d at 498. That mission has not been met here since the jury was presented no evidentiary basis upon which to assess the declarant's knowledge, perception or motivation.

Under the circumstances of this case, the constitutional error cannot be considered harmless. The harmless error test as most recently stated by the Supreme Court is whether, absent the constitutional error, it is "clear beyond a reasonable doubt that the jury

would have returned a verdict of guilty." United States v. Hasting, _____U.S._____, 103 S.Ct. 1974, 1981, 76 L.Ed.2d 96 (1983). Without the hearsay evidence, the state presented a strong circumstantial case against Williams. The physical evidence in the car, Williams' appearance at the time of arrest and the testimony which placed him leaving his nearby business shortly before the accident, point to Williams as the driver of the car. Williams, however, also put on a case of circumstantial evidence which supported his

theory that the car had been stolen. As the district court points out, the most important factor concerning the hearsay statements is that they constituted the sole direct evidence placing Williams at the scene. Without this evidence, the trial would have turned on credibility determinations and the weighing of the circumstantial evidence. Since there is a doubt that the jury would have found Williams guilty without the identifying statements, the admission of the hearsay statements cannot be considered

harmless. Having determined that the petitioner was denied his sixth amendment right to confrontation and that this error was not harmless, I would grant the writ of habeas corpus.

FOOTNOTES

FAY, Circuit Judge:

[1]The trial judge sentenced Mr. Williams to one year of incarceration for the misdemeanor conviction. He had served approximately fur and one-half months of the sentence when he was released on bond by the federal district judge pending disposition of his habeas petition. He remains subject to serving the balance of his sentence.

[2]The sixth amendment provides in part: "In all

criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...." The right to confrontation is a fundamental right applicable to the states under the fourteenth amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d. 923 (1965).

[3]We disagree with the district court's conclusion that the res gestae exception is not "firmly rooted in Georgia law." Although we find that it is a firmly embedded exception to the hearsay rule

we also note that it has been criticized by both the commentators and the courts. See, e.g., Cox v. State, 64 ga. 374, 410 (1897); Harper, Res Gestae in the Georgia Law of Hearsay, 5 Mercer L.Rev. 257 (1954). The four current generally prevalent exceptions that were part of the res gestae label are declarations of present bodily condition, declarations of present mental state or emotion, excited utterance and present sense impressions. See Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984); McCormick on

Evidence 686-711 (2d ed. 1972); 4 Weinstein's Evidence §803(1)[01]-(3)[06](1981).

[4]The use of the transcript of the preliminary hearing was permitted by an Ohio statute which permits the use of such testimony when the witness cannot be produced at trial. See, Ohio Rev.Code Ann. §2945.49(1975).

CLARK, Circuit Judge, dissenting:

[1]The Court in California v. Green stated that cross-examination was the best device invented for the discovery of

truth. 399 U.S. at 158, 90 S.Ct. at 1935, 26 L.Ed.2d at 497.

[2]According to the Court in Dutton, if the hearsay statement contains no assertions of past fact, then it carries on its face a warning to the jury not to give it undue weight. This is because the jury is just being invited to infer something rather than accept it as fact.

[3]It is true that one hearsay witness testified that the driver "looked just like Hosea Williams" but the other two witnesses testified that

the driver was expressly identified as Williams. One of these overheard the declarant say that the driver was Williams. The final hearsay witness testified that while he and some others were helping the injured driver an unidentified black man came up and asked the injured man if he knew who had hit him. When the dazed victim said that he did not, the declarant said "Hosea Williams" after standing around two or three minutes and melted away into the crowd.

APPENDIX B

Denial of Rehearing

IN THE UNITED STATES

COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 83-8464

HOSEA LORENZO WILLIAMS

PETIONER-APPELLEE,

VS.

WAYNE MELTON, ET AL.

RESPONDENTS-APPELLANTS.

Appeal from the United States

District Court for the

Northern District of Georgia

ON PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING
EN BANC

(Opinion June 7, 1984 11th Cir., 1984, ____F.2d____).

Before RONEY, FAY and CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Proceudre; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

Judge Fay

United States Circuit Judge

APPENDIX C

District Court Order

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

HOSEA LORENZO WILLIAMS

Petitioner,

vs.

WAYNE MELTON, et al.

Respondents

CIVIL ACTION NO. C82-437A

ORDER

This habeas corpus petition filed pursuant to 28 U.S.C., §2254 is presently before the Court on the magistrate's report and recommendation that the petition be denied. Although petitioner Hosea Williams is presently free on bond granted by the magistrate on November 10, 1982, pending a decision by this Court on his habeas corpus petition, he remains subject to serving the balance of a one-year sentence imposed by the DeKalb County Superior Court following his 1981 conviction

for leaving the scene of an accident.

Petitioner challenges the validity of his conviction on the sole ground that his sixth amendment right to confrontation of the witnesses against him[1] was violated by the trial court's admission of certain hearsay statements under the res gestae exception to the hearsay rule. In its opinion upholding the trial court's admission of the statements, the Georgia Court of Appeals described the challenged testimony as follows:

> Two residents of the area who had proceeded to the scene immediately upon hearing the crash testified that they overheard an unidentified black male in the crowd of onlookers remark that the driver of the abandoned vehicle was Hosea Williams. A third such resident testified that he heard an unknown declarant state that the driver had been wearing a flowered shirt and "looked like" Hosea Williams.

Williams v. State, 162 Ga.App. 415, 415, 291 S.E.2d 732 (1982).

The sixth amendment confrontation clause restricts the use of otherwise admissible hearsay in two ways. First, the state must demonstrate the

unavailability of the hearsay declarant; and second, where the declarant is shown to be unavailable, a hearsay statement may be used only if made under circumstances providing sufficient "indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 65-66 (1980). In the instant case petitioner does not object to the magistrate's finding that the hearsay declarant[2] was shown to be unavailable. The sole issue before the Court, therefore, is whether the circumstances surrounding the making of the hearsay

statements contain sufficient "indicia of reliability" to comport with the requirements of the confrontation clause.

As already noted, the Georgia Court of Appeals held that "the trial court acted within its discretion in finding the declarations to be part of the res gestae." Williams, supra, 162 Ga.App. at 418.[3] The state habeas court, in addressing the confrontation issue, relied on the Georgia Court of Appeals opinion in Ewald v. State, 156 Ga.App. 68, 274 S.E.2d. 31 (1980), which was decided after the Supreme

Court's decision in Roberts, supra, and which apparently held that statements properly admitted as a part of the res gestae do not violate a defendant's right to confrontation. Order on Petition for Writ of Habeas Corpus, Civil Action No. 82-6225, (Super. Ct. DeKalb Co. Aug. 9, 1982) (Fuller, J.).[4]

Under Georgia law the res gestae exception to the hearsay rule admits "[d]eclarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or

afterthought...." O.C.G.A., §24-3-3 (Michie 1982). In applying the exception, the Georgia courts continue to follow the interpretation laid down in the early case of Mitchum v. State, 11 Ga. 615, 627 (1852): "If the declarations appear to spring out of the transaction - if they elucidate it - if they are voluntary and spontaneous, and if they are made at a time so near to it, as reasonably to preclude the idea of deliberate design, then they are to be regarded as contemporaneous."

In his report the

magistrate points out that

> [t]he Georgia res gestae exception to the hearsay rule appears to be an amalgamation of two well-recognized common law exceptions to the hearsay rule: the present sense impression rule and the excited utterance rule. Those two rules admit a statement if it was made concerning an event while the declarant was observing the event or under the stress of excitement caused by the event.

Report and Recommendation at 7. Noting that "[i]t has been long recognized that a statement made spontaneously while perceiving an event is sufficiently reliable to justify its admission even though it is hearsay," the

magistrate found that "[t]he Georgia res gestae exception is a firmly rooted hearsay rule." Id. Following the Roberts Court's holding that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception," 448 U.S. at 66, and noting that this Court is bound by the state court's evidentiary ruling that the hearsay statements were a part of the res gestae, see, e.g., McLaughlin v. Vinzant, 522 F.2d. 448, 450 (1st Cir. 1975), the magistrate concluded that

the statements bore adequate indicia of reliability, and that their admission therefore did not violate petitioner's sixth amendment right of confrontation. Id. at 8.

After careful consideration, this Court has concluded that it cannot agree with the magistrate's initial premise, namely, that the Georgia res gestae exception is a "firmly rooted hearsay exception" within the meaning of Roberts, supra. In Roberts, the Court pointed out that it had applied the "indicia of reliability" requirement

"principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" Roberts, supra, 448 U.S. at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)). The Court noted that the exceptions for dying declarations, cross-examined prior-trial testimony, and business and public records were among these "firmly rooted" exceptions. Id. n.8. The res gestae exception, has

for many years been the object of severe criticism from both commentators and courts because of its vagueness and imprecision.

More than sixty years ago, one commentator inveighed against continued recognition of the exception in the following terms:

> The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as "res gestae." It is probable that this troublesome expression owes its existence and persistence in our law

> of evidence to an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking.

Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229 (1922). And even before the turn of the century, the Supreme Court of Georgia itself "eschewed anything so impracticable" as a precise definition of the res gestae:

> The difficulty of formulating a description of the res gestae which will serve for all cases, seems insurmountable. To make the attempt is something like trying to execute a portrait that shall enable the possessor to recognize every member of a

numerous family. Cox v. State, 64 Ga. 374, 410 (1897).

More recently, an observer of the Georgia rule concluded that "[t]he confusion gets further compounded with each new attempt to explain 'what res gestae really means,'" and insisted that [t]here is no remedy except to banish irrevocably this insidious phrase from our legal vocabulary." Harper, Res Gestae in the Georgia Law of Hearsay, 5 Mercer L.Rev. 257 (1954). Finally, since the Court is concerned here with a question of federal

constitutional law, it is signficant that the Federal Rules of Evidence reject a res gestae exception to the general hearsay exclusion in favor of more specifically delimited exceptions for present sense impressions, excited utterances, and then existing mental, emotional or physical conditions. See Fed.R.Evid. 803 (1)-(3).

In light of the vagueness and imprecision of the res gestae exception, this Court declines to hold that any evidence admitted under this exception in accord with state

evidentiary law necessarily comports with the requirements of the sixth amendment confrontation clause. Rather, as mandated by Roberts, supra, 448 U.S. at 66, this Court holds that such "evidence must be excluded...absent a showing of particularized guarantees of trustworthiness."

Accordingly, the Court now turns to an analysis of the particular circumstances surrounding the challenged hearsay testimony admitted in the instant case to determine whether there existed sufficient guarantees of

trustworthiness to meet federal constitutional requirements. The Court is guided in its analysis by the plurality opinion in Dutton v. Evans, 400 U.S. 74, 89 (1970), where Justice Stewart wrote "that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'") _ Quoting California v. Green, 399 U.S.

149, 161 (1970).

In Dutton, supra, 400 U.S. at 88-89, Justice Stewart applied the following criteria in determining that an out-of-court declaration of a co-conspirator had sufficient indicia of reliability for admission into evidence:

> First, the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-exami-

> nation could have shown that Williams was not in a position to know whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams has no apparent reason to lie to Shaw. His statement was spontaneous, and it was against his penal to make it.

Using the Dutton criteria as a framework for analysis, and after a careful review of the entire trial transcript, this Court is ineluctably drawn to the conclusion that the hearsay statements admitted at trial

over petitioner's objection did not bear sufficient indicia of reliability to meet the constitutional standard.

First of all, unlike in Dutton, the challenged statements in the instant case were express assertions of past fact. Although the state court's evidentiary ruling that the statements were part of the res gestae implies that they were legally deemed to have been uttered contemporaneously with the facts asserted therein, this does not alter the reality reflected in the trial testimony that the

statements were actually made between ten and fifteen minutes after the events described had occurred. Thus, Mr. Robert Steve testified that about ten or fifteen minutes had elapsed after the accident when an unidentified black man who was in the crowd that had gathered remarked to him and several of the other bystanders that "the guy that was driving that car...looked just like Hosea Williams," that this man who looked like Williams "went over and looked at him [the injured driver of the other car] and [then] went down the street,"

and that [h]e had on a flowered shirt" (T-46, 50, 56). Mrs. Addie Harkness also testified that it was ten or fifteen minutes after the accident that she overheard an unidentified black male state that it was Hosea Williams who had been driving the abandoned car (T-62, 64). Finally, Mr. Horace Epperson, while not indicating the specific amount of time that had elapsed, testified that some time after the accident, while he and other bystanders were attending to the injured driver, an unidentified black man

> comes up and says, "Do you know who hit you, Brother?" And the guy says, "No." He is sitting there like this, you know. He said, "Hosea Williams." And at that time he stood around there for two or three minutes and then just melted into the crowd. (T-74).

Second, there was no evidence whatsoever of the hearsay declarant's personal knowledge of the identity of the driver of the abandoned car.[5] In fact, testimony elicited by defense counsel on his cross-examination of Travis J. Vanlaeys, a DeKalb county deputy sheriff who was the first law enforcement officer to arrive at the scene of the

accident (T-179), established that the declarant's "knowledge" might have been based on an overheard conversation between Vanlaeys and DeKalb County police officer C.A. Jones. Vanlaeys testified that shortly after his arrival he and Jones searched the abandoned car while onlookers stood by within a distance of twenty to twenty-five feet, and that upon discovering correspondence addressed to and from petitioner, Jones "said something like 'Look at this, Hosea Williams' [and] I said

'Hosea Williams?'" (T-209). Paraphrasing Dutton, supra, 400 U.S. at 88-89, under these circumstances it is certainly conceivable that cross-examination could have shown that the hearsay declarant was not in a position to know whether or not petitioner Williams was involved in the accident.

Third, although the possibility that the hearsay declarant's statements were founded on faulty recollection is perhaps remote given the relatively short time interval between the accident and the

time the statements were made, the complete absence of an opportunity to cross-examine left unexplored the mental state of the declarant at the time of his statements. The defense thus had no opportunity to investigate possible drug or alcohol intoxication, or other mental condition, which could have affected even very short-term memory.

Fourth, and finally, even accepting, as this Court must, the state court's determination that the statements were part of the res gestae, the totality of circumstances under which

the statements were made does not give adequate assurance that the declarant was without motive or opportunity to deliberately misrepresent petitioner's involvement in the accident. Petitioner's long and controversial career in public affairs has undoubtedly garnered him many enemies. Moreover, if in fact petitioner was not the driver of the abandoned car, then one person with clear motive and opportunity to lie about his involvement would have been the person who <u>was</u> the driver. Nothing in the evidence

presented at trial negates the possibility that the hearsay declarant himself might have been the driver of the "abandoned" car seeking to deflect suspicion from himself to petitioner, whose car he had stolen.

The foregoing analysis has led this Court to the conclusion that the challenged hearsay statements do not bear sufficient indicia of reliability to withstand scrutiny under the confrontation clause. It is clear beyond doubt that in the absence of cross-examination,

and without an opportunity to observe the declarant testifying under oath, "the trier of fact [was denied] a satisfactory basis for evaluating the truth of the [hearsay] statement[s]." Green, supra, 399 U.S. at 161. Accordingly, the Court concludes that the admission of the hearsay testimony over petitioner's objection was a violation of his sixth amendment right to confront the witnesses against him.

This Court's determination that a constitutional error has been committed, however, is not

the end of the required analysis. "[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Chapman v. California, 386 U.S. 18, 22 (1967). In determining whether a constitutional error is harmless, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have

contributed to the conviction." Id. at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). In a recent case, the Supreme Court stated the test this way: "The question a reviewing court must ask is this: absent the [admission of the hearsay statements], is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" United States v. Hasting, 51 U.S.L.W. 4572, 4575 (U.S. May 23, 1983) (citing Harrington v. California, 395 U.S. 250, 254 (1969)). Although this Court

is uncertain whether the Chapman and Hasting statements of the applicable standard are entirely consistent, cf. Harrington, supra, 395 U.S. at 255 (Brennan, J. dissenting) (Harrington "overrules" Chapman), under either formulation there is no doubt that the error in this case was not harmless to petitioner.

It is true that the state presented substantial circumstantial evidence that petitioner was the driver of the abandoned car. Law enforcement officers who arrived on the scene shortly

after the accident searched the car and found various documents addressed to and from petitioner Williams, as well as a Hertz rental agreement for the vehicle in Mrs. Williams' name (T-121-22). Approximately thirty minutes after the accident petitioner was arrested near the Bingo Palace, a business establishment operated by him and located within a mile of the scene of the accident (T-185-91; 197). Petitioner was wearing a flowered shirt, was somewhat disheveled, and had a cut over his right eye. Id.

Later, at the police station, a briefcase containing some $1,400.00 in receipts from the Bingo Palace was removed from the car trunk and claimed by petitioner (T-241-45). A plastic bag of tomatoes was also found in the car, id., and a customer at the Bingo Palace on the night of the accident testified that she gave petitioner a plastic bag of tomatoes that night and later saw him take the tomatoes and his briefcase and head for the front door of the Bingo Palace just before 8:00 P.M. (T-102).

With regard to the cut on

petitioner's forehead, Larry J. White, an accident specialist with the DeKalb County Police Department, testified that the rearview mirror in the abandoned car had been broken off the windshield and cracked on the left side. According to White, petitioner's wound and the broken mirror were consistent with the probable pattern of impact on the driver of the abandoned car (T-232-38).

Petitioner, on the other hand, also put forward circumstantial evidence in support of his position that

the car had been stolen shortly before the accident and was being driven by the unknown thief when the accident occurred. The general manager of the Bingo Palace testified that she had put the tomatoes and money in the car and may have inadvertently left the keys in the trunk lock (T-279-83). She and both of Williams' sons testified that he was at the Bingo Palace between 8:00 and 9:00 P.M. on the night of the accident (T-283, 337-38, 365). One of the two sons also described the cut over petitioner's eye as just a

scratch (T-382), although a nurse at the jail who examined the wound testified that she told petitioner it would require about five stitches to close (T-171-73). Petitioner himself testified that he was working at the Bingo Palace the night of the accident and cut his head on the jagged edge of a door in a back storage room (T-434-35, 478-79). He further testified that he had left the Bingo Palace only to go to a nearby convenience store for a band-aid, and it was then that he was arrested (T-435-36).

This brief review of the

evidence is sufficient to point up the most significant factor concerning the improperly admitted hearsay statements, namely, that they constituted the sole direct evidence placing petitioner at the scene of the accident. Cf. Harrington, supra, 395 U.S. at 254 (petitioner's presence at scene of crime was established by other direct evidence, so that hearsay evidence was merely "cumulative"). This Court certainly is not convinced beyond a resonable doubt, as it must be before holding that a constitutional

error was harmless, that there is no reasonable possibility that this unique evidence of such a damaging nature contributed to the conviction of petitioner.[6] Paraphrasing Hasting, supra, 51 U.S.L.W. at 4575, absent the admission of the hearsay statements, it is not clear beyond a reasonable doubt that the jury would have returned a verdict of guilty.

On the contrary, in this Court's view, the improperly admitted hearsay evidence to the effect that some ten to fifteen minutes after the accident an unidentified black

man was overheard to say that Hosea Williams was the guilty party "and then just melted into the crowd" (T-74), was the linchpin of the state's otherwise purely circumstantial case. Absent this evidence, the jury would have been required to weigh more carefully the parties' conflicting theories of the available evidence, with the attendant need to judge the credibility of the various witnesses, in order to reach an ultimate determination of guilt or innocence. This Court cannot, under these

circumstances, presume to know beyond a reasonble doubt what that determination would have been.[7]

Accordingly, the Court having held that petitioner was denied his sixth amendment right to confront the witnesses against him, and that this error was not harmless, the petition for writ of habeas corpus is hereby GRANTED. However, the writ's mandate is SUSPENDED for a period of 90 days to afford the state an opportunity to retry petitioner. The magistrate's bond shall remain in effect

during this period. If the state does not retry petitioner withn 90 days, petitioner shall be DISCHARGED from any further incarceration pursuant to his conviction in the Superior Court of DeKalb County, Georgia, on April 21, 1981.

IT IS SO ORDERED, this 9th day of June, 1983.

Marvin H. Shoob, Judge
United States District Court
Northern District of Georgia

FOOTNOTES

[1]U.S. Const. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..." This provision is made applicable to the states by the due process clause of the fourteenth amendment. Pointer v. Texas, 380 U.S. 400 (1965).

[2]The record does not establish that there was more than one declarant whose statements were overheard. The Court will, therefore, refer to the source of the statements in the singular.

[3]The court of appeals did not address the constitutional question, because petitioner failed to raise that issue on direct appeal.

[4]Petitioner's subsequent application for a certificate of probable cause to appeal the denial of habeas relief was denied by the Supreme Court of Georgia on October 27, 1982. The instant petition was filed on November 9, 1982.

[5]Cf. McLaughlin, supra, 522 F.2d. at 451, where the hearsay evidence was admitted under the state's spontaneous utterance exception:

> It is true that there is no evidence of precisely where Dellamano [the hearsay declarant] was and what events she witnessed leading her to announce that McLaughlin [petitioner] had shot Sheridan. But, it was permissible to draw an inference not only from the force of the statement itself but from the fact that she was accompanying McLaughlin and was somewhere in the immediate vicinity of the fatal event, that she possessed firsthand knowledge of the killing. See McCormick on Evidence §297 at 705 (2d. ed. 1972)

Just as in McLaughlin, there is no evidence in the instant case of precisely where the hearsay declarant was or what events he witnessed that led him to make the statements later testified

to by the three nearby residents. Unlike McLaughlin, however, there is also nothing from which one could infer that the declarant was speaking from firsthand knowledge, other than the content of the statements themselves. There is no evidence of where the declarant came from, when he arrived on the scene, or whether he witnessed the accident at all. Unlike other cases, such as McLaughlin, where admission of hearsay testimony has been upheld, in the instant case literally nothing is known about the declarant except that he made certain statements inplicating petitioner in a crime "and then just melted into the crowd [T-74]." The use of such anonymous accusations of wrongdoing is precisely the sort of evil that the confrontation clause was intended to prevent.

[6]Indeed, the jury's request that the Court reinstruct them on the meaning of "res gestae" suggests that the hearsay evidence may very well have been at the focus of their deliberations. Moreover, in response to the request, the

trial judge charged the jury, inter alia, "that statements made at the scene of a crime may be admitted at trial as original evidence where shown that they are contemporaneous, voluntary, and made at a time which indicates the lack of deliberation and deception and freedom from all suspicion of device or afterthought" (T-556). In this Court's view, this charge improperly emphasized the trial judge's finding that the evidence was trustworthy and therefore may have caused the jury to give the evidence undue weight in its deliberations.

[7]The apparently contradictory testimony of Barbara Golden concerning the taking of certain photographs, which the defense introduced to prove that petitioner's head wound was only superficial, was certainly damaging to petitioner's case. However, even though Ms. Golden later pled guilty to perjury, this Court cannot rely on that contradictory testimony to discredit petitioner's entire defense and thereby reach the conclusion that the

constitutional error was harmless. All of this would simply go to the credibility of Ms. Golden and petitioner himself, and where a verdict depends on such credibility determinations, the case is not one in which a reviewing court is competent to determine that a guilty verdict was inevitable and any error therefore harmless.